



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 23.08.2021

CORAM

WEB COPY

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.1296 of 2006

1.Bairankaliappa Gounder (Died)
2.Veluchamy ... Appellants/Respondents/Plaintiff
(A2 is brought on record as LR of the
deceased sole appellant vide order dated
12.08.2021 made in C.M.P. (MD)Nos.6063, 6065
and 6067 of 2021 in S.A. (MD)No.1296 of 2006
by GRSJ)

Vs.

1.Periasamy
2.Karupathal ... Respondents/Appellants/Defendants

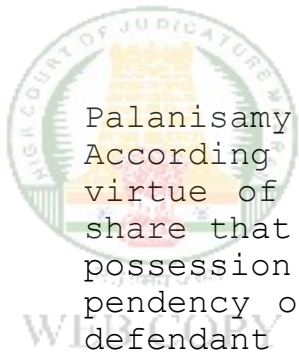
Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree of the Subordinate Court, Palani, dated 26.04.2005 in A.S.No.42 of 2003, setting aside the judgment and decree passed by the District Munsif Court, Palani, dated 05.09.2003 in O.S.No.193 of 1998.

For Appellants : Mr.S.Anand Chandrasekar,
For M/s.Sarvabhauman Associates.

For Respondents : Mr.K.Govindarajan,
For Mr.R.Sureshkumar.

JUDGEMENT

This second appeal arises out of a suit for partition. This appeal was filed by the plaintiff in the suit. He passed away and his son has since come on record. The original appellant filed O.S.No.193 of 1998 claiming 5/16th share in the suit property. The case of the plaintiff is that the suit property was jointly purchased by the plaintiff/Bairankaliappa Gounder, the mother/Periyammal, brother Periyasamy and another brother Palanisamy under Ex.A2 dated 25.09.1956. The suit property measures an extent of 7 acres and 47 cents. Periyammal had passed away some time in the year 1986 without executing any Will. Therefore, the mother's 1/4th share in the suit property devolved in equal measures on the three sons, namely., Bairankaliappa Gounder, Periyasamy and Palanisamy and daughter Papathi. Palanisamy had passed away leaving behind his wife/Karupathal and minor son/Cheniappan (defendants 2 and 3 as his surviving legal heirs). During his life time,



Palanisamy had purchased the share of Periyasamy as well as Papathi. According to the plaintiff, he is entitled to his 1/4th share by virtue of being a joint purchaser of the suit property and 1/16th share that devolved from his mother. Seeking partition and separate possession of 5/16th share, the suit came to be laid. During the pendency of the suit, the third defendant passed away. The first defendant filed written statement controverting the plaint averments. The defendants contended that there was partition of the ancestral properties on 25.08.1986 under Ex.A11. The plaintiff was allotted 3 acres and 40 cents while Periyasamy and Palanisamy were allotted 1 acre and 21 cents and 1 acre and 49 cents respectively. The stand of the defendants is that since the plaintiff was allotted more share, he relinquished his 1/4th undivided share in the suit property in favour of Palanisamy. They would further claim that the mother's share devolved in its entirety on the daughter/Papathi and since Papathi sold the same in favour of Palanisamy, the plaintiff cannot have any claim.

2. Based on the divergent pleadings, the trial court framed the necessary issues. The plaintiff's son/Velusamy examined himself as P.W.1 and marked Exs.A1 to A11. The first defendant examined himself as D.W.1 and one Shanmugavel, the attesor of Ex.A11 dated 25.08.1986 was examined as D.W.2.

3. After considering the evidence on either side, the trial court by judgment and decree dated 05.09.2003 granted preliminary decree allotting 5/16th share in favour of the plaintiff. Aggrieved by the same, the defendants filed A.S.No.42 of 2003 before Sub Court, Palani. By the impugned judgment and decree dated 29.04.2005, the first appellate court set aside the decision of the trial court and allowed the appeal and dismissed the suit in toto. Questioning the same, this second appeal came to be filed.

4. The second appeal was admitted on the following substantial questions of law:-

"1. When Ex.A11 does not speak about allotment of appellant's share to the 2nd respondent's husband or about relinquishment of appellant's share in suit properties, in specific terms, whether the 1st appellate Court is correct in holding that the said aspect can be inferred from the recitals of Ex.A11?

2. When the respondents have not specifically raised a plea of estoppel in their pleadings before trial Court, and when such an issue has not been framed and discussed by trial Court, whether the respondents can be allowed to raise such plea before the 1st appellate Court? and



3. When the appellant's sister has sold her share in the suit properties to 2nd respondent's husband, which is admitted by respondents in their pleadings and evidence, whether the first appellate Court is correct in law in holding that she is a necessary party to the suit and suit is bad for non joinder of necessary party?"

5. Heard the learned counsel on either side.

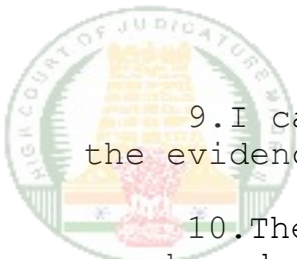
6. The learned counsel for the appellants submitted that the suit for partition was contested on primarily on two grounds:-

(a) The plaintiff was a mere name lender in Ex.A2 dated 25.09.1956 by which the suit property was purchased.

(b) The plaintiff had relinquished his 1/4th share in the suit property under Ex.A11 dated 25.08.1986.

7. The learned counsel for the appellants pointed out that when the plaintiff was eldest son and when his name is very much figuring as one of the joint purchaser of the suit property, it is futile to contend that he was a mere name lender. In any event, such a defence is on the face of it not maintainable. The learned counsel took me through the terms of Ex.A11/partition deed dated 25.08.1986. The plaintiff and his brothers namely., Periyasamy and Palanisamy are parties to the document. The partition had taken place among the members of the larger joint family on the paternal side. The plaintiff was allotted "C" schedule, Periyasamy was allotted "D" schedule and Palanisamy was allotted "E" schedule. Item No.10 of "E" schedule mentions that Palanisamy had been given 1/4th undivided share in the suit property. The learned counsel appearing for the appellants would point out that Ex.A11 nowhere states that the plaintiff's 1/4th undivided share in the suit property had been allotted to the second defendant's husband and therefore, the first appellate court could not have inferred that the first appellant had relinquished his share in the suit property. He also would point out that no issue had been framed in this regard by the Court below. His further contention is that the first appellate court erred in non-suiting the plaintiff for not impleading the sister/Papathi, when admittedly she had sold her share in the suit property in favour of Palanisamy. He called upon this Court to answer the substantial questions of law in favour of the appellants and set aside the impugned judgment and decree passed by the first appellate court and restore the decision of the trial court.

8. Per contra, the learned counsel appearing for the respondents submitted that the impugned judgment and decree does not call for any interference.

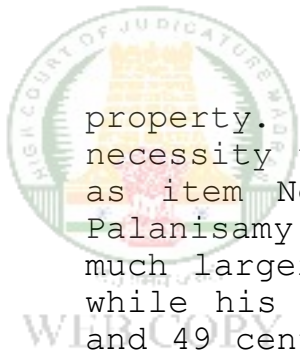


9.I carefully considered the rival contentions and went through the evidence on record.

10. There is no dispute that the suit property was jointly purchased by the plaintiff, the first defendant/Periyasamy, the deceased brother/Palanisamy and their mother/Periyammal under Ex.A2 dated 25.09.1956. It is not open to the respondents to contend that the plaintiff was a mere name lender. It is obvious that the plaintiff was very much having 1/4th undivided share in the suit property. There is again no dispute that Periyammal passed away intestate. Periyammal also obviously had 1/4th undivided share in the suit property. Therefore, her share in the suit property devolved in equal measure on all her children namely., three sons and the daughter/Papathi. Papathi had sold her right in the suit property in favour of Palanisamy. Therefore non-impleading of Papathi will not render the suit as bad for non joinder. I therefore answer the third substantial question of law in favour of the appellants.

11. It is not known as to when Periyammal passed away. Be that as it may, there is nothing on record to show that the plaintiff had sold or relinquished what he inherited from his mother. Therefore, I hold that the plaintiff was very much entitled to 1/16th share in the suit property. The first appellate court clearly erred in non-suiting the plaintiff in toto.

12. The next question that calls for determination is whether the plaintiff can be said to have relinquished his 1/4th share in the suit property. The specific stand of the defendants is that in a partition that took place among the members of the larger joint family on the paternal side, the plaintiff and the two brothers were allotted "C" schedule "D" schedule and "E" schedule. On a perusal of Ex.A11 dated 25.08.1986, it is seen that the plaintiff was allotted "C" schedule property (10 items). The 10 items totally measure 3 acres and 40 cents. The first defendant/Periyasamy was allotted "D" schedule and the total extent of land allotted to him would come to 1 acre and 21 cents. Palanisamy was allotted "E" schedule and the total of extent of land allotting to him would come to 1 acre and 49 cents. One of the items allotted to Palanisamy in the "E" schedule included 1/4th undivided share in the suit property. The contest revolves around this. While the learned counsel appearing for the appellants would contend that Ex.A11 does not specifically states that the plaintiff's 1/4th share in the suit property was allotted to Palanisamy while the defendants would specifically argue that the overall reading of Ex.A11 would show that it was the plaintiff's 1/4th share in the suit property that was allotted to the husband of the second defendant. A reading of recitals of Ex.A11 would go to show that a final partition had taken place among the members of the joint family. The learned counsel for the appellants would contend that Ex.A11 pertains only to the



property. If that be so, there was no absolutely no need or necessity to include the 1/4th undivided share in the suit property as item No.10 in "E" schedule and allot the same in favour of Palanisamy. The plaintiff cannot dispute that he was allotted a much larger share under Ex.A11. He was given 3 acres and 49 cents while his brothers were given only 1 acre and 21 cents and 1 acre and 49 cents respectively. After going through the contents of the "C" "D" and "E" schedules, I am satisfied that the properties are contiguously located. In any event, when the defendants have specifically taken the plea that under Ex.A11, the plaintiff relinquished his 1/4th undivided share in the suit property and also sought to establish the same by examining D.W.2, attester of Ex.A11 document, the plaintiff ought to have stepped into the witness box to controvert the same. The plaintiff for whatever reason did not enter the witness box. It was only his son Velusamy, who entered the witness box. I have to necessarily take an adverse view of the conduct of the plaintiff in not entering the witness box. The defendants have clearly probabalized that the allotment of 1/4th undivided in the suit property obviously referred to the plaintiff's 1/4th undivided share. Be that as it may, the first appellate court erred in non-suiting the plaintiff in toto. I have already held that under Ex.A2, the mother/Periyammal did have 1/4th share. She passed away intestate. Therefore, her share devolved in equal measure on all the three sons and daughter. Ex.A11 talks about only 1/4th undivided share in the suit property and it does say anything more. Therefore, I hold that the plaintiff is entitled to 1/16th undivided share in the suit property. The impugned judgment and decree passed by the first appellate court are accordingly modified and the preliminary decree is granted allotting 1/16th share in the suit property in favour of appellants.

13.The second appeal is partly allowed accordingly. No costs.

Sd/-

Assistant Registrar (CS-I)

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Sub Assistant Registrar(CS)

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Note :In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.



To:

1.The Subordinate Judge,
Palani.

2.The District Munsif,
Palani.

Copy to:

The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai. (2 COPIES)

+1 CC to M/s.SARVABHAUMAN ASSOCIATES, Advocate (SR-27024[F] dated
24/08/2021)

+1 CC to M/s.S.R.SURESH KUMAR, Advocate (SR-27100[F] dated
24/08/2021)

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RD(17.02.2022) 6P 7C